Filed 4/10/06 Watts v. Ferrellgas, L.P. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RONALD WATTS, Plaintiff and Respondent, v. FERRELLGAS, L. P., Defendant and Appellant.	B182060 (Los Angeles County Super. Ct. No. MC013970)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Chesley N. McKay, Jr., Brian C. Yep and Alan S. Rosenfield, Judges. Reversed and remanded.

Law Offices of Fletcher, White & Adair, John R. Fletcher and Paul S. White for Defendant and Appellant.

Mitchell S. Wagner for Plaintiff and Respondent.

Ferrellgas, L. P., appeals from the judgment entered following a jury trial in this products liability action that awarded Ronald Watts $406,244.22 in compensatory damages and $1 million in punitive damages. Ferrellgas contends the trial court prejudicially erred in granting Watts's motion for summary adjudication directed solely to Ferrellgas's liability for selling a defective product because the motion did not dispose of an entire cause of action and triable issues of fact exist as to Watts's comparative fault. Ferrellgas also asserts reversal is required because the jury did not make any findings as to Ferrellgas's liability for failure-to-warn, the cause of action upon which Watts's claim for punitive damages depended. We agree with each of these contentions and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident*

In May 2002 Watts purchased from Ferrellgas a propane tank to fuel a new furnace. The tank included a pressure-relief valve, manufactured by Sherwood, Harsco Corporation Gas & Fluid Control Group (Sherwood).[1]

In July 2002 Watts's wife told Watts she had heard a hissing sound coming from the propane tank. Watts decided to investigate by putting his face close to the tank to determine whether he could smell propane or hear the sound his wife had described. At that moment, the tank's pressure-relief valve suddenly released, discharging propane into Watts's eye.

2. *The Lawsuit*

Watts sued Ferrellgas in a products liability action, alleging the pressure-relief valve was defective. In an attachment to his Judicial Council Form Complaint, Watts alleged he was also entitled to punitive damages because Ferrellgas knew consumers did not appreciate the dangers associated with the discharge of a pressure-relief valve; Ferrellgas had a duty to warn consumers of this danger and to advise them to stay clear of

---

[1] Ferrellgas filed a cross-complaint against Sherwood for indemnity. The cross-complaint was severed from the main action following the trial court's ruling on Watts's summary adjudication motion.

the pressure-relief valve under all circumstances; and Ferrellgas acted with malice in failing to give those warnings.

3. *Watts's Summary Adjudication Motion*

On May 7, 2003 Watts moved for summary adjudication based on Ferrellgas's admission in written discovery that the valve contained a manufacturing defect.[2] Watts's moving papers also included his own declaration describing the accident and asserting that Ferrellgas had not warned him of the dangers associated with pressure-relief valves. The motion did not address Watts's damages.

Ferrellgas opposed the motion on several grounds: Because the motion failed to address damages, Ferrellgas argued it did not dispose of an entire cause of action and thus was not authorized under Code of Civil Procedure section 437c, subdivision (f)(1).[3] In a related argument, Ferrellgas asserted triable issues of fact existed as to whether Watts was comparatively at fault. Ferrellgas additionally argued the motion failed to identify whether it was directed to the defective product claim, the failure-to-warn claim or both.[4]

In his reply Watts clarified his motion was directed solely to Ferrellgas's liability for product defect, and not to the separate failure-to-warn claim. Watts also included with his reply Ferrellgas's answers to special interrogatory numbers 12 and 13 in which Ferrellgas admitted the pressure-relief valve contained a manufacturing defect.[5]

---

[2] In support of the motion Watts provided Ferrellgas's responses to requests for admissions in which Ferrellgas admitted that, to the extent the pressure relief valve discharged at a pressure "less than 275 psi," it "did not perform as designed at the time of the incident."

[3] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[4] Ferrellgas also argued the responses to the requests for admissions were insufficient to establish a manufacturing defect as a matter of law.

[5] Ferrellgas responded to the interrogatories after Watts had filed his motion. Special interrogatory number 12 asked, "Does Ferrellgas contend Sherwood's pressure relief valve was defective in any way?" Ferrellgas responded, "Yes." Special interrogatory number 13 asked, "If your answer to [i]nterrogatory no. 12 was anything other than an unqualified 'NO,' describe each and every defect you contend is or was

4. *The Trial Court's Ruling on Watts's Motion*

The trial court granted Watts's motion, rejecting Ferrellgas's argument the motion was deficient because it failed to address damages and its contention triable issues of fact existed as to Watts's comparative fault. Based on Ferrellgas's interrogatory responses admitting the pressure-relief valve did not perform as designed,[6] the court concluded Ferrellgas was strictly liable as a matter of law for the manufacturing defect and Watts was not negligent in any respect: "[T]he admitted defect in the valve was the sole legal cause of his eye injury." The court left the issue of damages as to the defective product claim, along with the claims for failure-to-warn and punitive damages, to be resolved by the jury at trial.

5. *Ferrellgas's Motions for Ex Parte Relief and Reconsideration*

After the summary adjudication hearing but before entry of the court's order, Ferrellgas filed an ex parte application to submit a supplemental opposition to Watts's motion. Ferrellgas argued that, subsequent to the hearing on the motion, it had retained an expert witness who would testify the pressure-relief valve had performed as designed and thus did not contain a manufacturing defect. The court denied the application. Ferrellgas's subsequent motion for reconsideration based on the same "newly discovered evidence" was also denied.

6. *The Trial*

At trial both Watts and Ferrellgas presented evidence relating to the accident, Watts's damages, Ferrellgas's knowledge of the valves' discharge rates and the warnings (if any) given to Watts as to the risks associated with pressure-relief valves. At the close

---

present in the Sherwood pressure relief valve." Ferrellgas responded, "[It] is informed and believes that the pressure relief valve allowed propane to vent at pressure less than 275 p.s.i.," the temperature at which the relief valve was "designed to activate."

[6] Because the interrogatory responses relied on by the court were included for the first time in Watts's reply, the court invited Ferrellgas to seek a continuance to address that evidence. Ferrellgas declined, informing the court a continuance was unnecessary because Ferrellgas was "not going to change" its responses to those interrogatories.

of evidence the trial court instructed the jury, "The court has already determined that the valve was defective and that Ferrellgas is legally responsible for Mr. Watts's injuries. . . . The court has also determined that Mr. Watts was not at fault and that the defect in the valve was the sole cause of Mr. Watts's eye injury. In addition to the valve being defective, Mr. Watts also claims Ferrellgas did not include sufficient warnings of safety hazards . . . and . . . potential risks." The court went on to instruct the jury as to the elements of a failure-to-warn claim, but immediately after giving that instruction told the jury, "Ferrellgas's responsibility for Ronald Watts's claimed harm is not an issue for you to decide in this case. You must decide how much money will reasonably compensate Mr. Watts for the harm."

7. *The Verdict*

The special verdict form submitted to the jury without objection directed the jury to determine: (1) the amount of compensatory damages to be awarded; and (2) whether "Ferrellgas act[ed] with oppression or malice such that punitive damages should be awarded." The verdict form did not ask the jury to determine liability on the failure-to-warn claim.

The jury awarded compensatory damages in the amount of $406,244.22, answered "yes" to the question whether Ferrellgas acted with malice and, in a bifurcated proceeding directed solely to the amount of punitive damages, awarded Watts $1 million in punitive damages. Ferrellgas's motions for a new trial and for judgment notwithstanding the verdict were denied.

CONTENTIONS

Ferrellgas contends (1) summary adjudication was improper because the motion did not dispose of an entire cause of action and triable issues of fact exist as to Watts's comparative fault; (2) Ferrellgas's discovery responses do not establish a manufacturing defect as a matter of law; (3) the jury never assessed liability on Watts's failure-to-warn claim, the only claim as to which Watts requested punitive damages; and (4) the compensatory and punitive damage awards are not supported by substantial evidence.

DISCUSSION

1. *Standard of Review*

We review a judgment following a grant of summary adjudication de novo and decide independently whether the facts not subject to triable dispute warrant adjudication for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Lomes v. Hartford Financial Services Group, Inc.* (2001) 88 Cal.App.4th 127, 131; *Lunardi v. Great-West Life Assurance Co*. (1995) 37 Cal.App.4th 807, 819.)

2. *The Trial Court Exceeded Its Authority When It Granted Summary Adjudication on the Issue of Ferrellgas's Strict Liability for Manufacturing Defect*

Based on Ferrellgas's interrogatory responses, the trial court granted Watts's summary adjudication motion, finding Ferrellgas strictly liable for a manufacturing defect, while leaving the question of damages for the jury. The trial court was not authorized to grant a motion directed, as Watts's motion was, to "issues" rather than "causes of action." (§ 437c, subd. (f)(1).)

Section 437c, subdivision (f)(1), provides: "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages [as specified in Section 3294 of the Civil Code], or one or more issues of duty . . . . A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty."

As we explained in *Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1256, prior to the 1990 amendments to the summary judgment law, a party could move for summary adjudication of issues; and, if the trial court determined there were no triable issues of fact as to some but not all of the issues involved in the action, the court was required to specify that those issues were without substantial controversy. (See former § 437c, subd. (f), Stats. 1989, ch. 1416, § 16, pp. 6229-6230.)[7] In 1990 the Legislature amended

---

[7] In 1989 the summary judgment statute provided: "If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all of the

section 437c, subdivision (f), to "stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or a defense." (Stats. 1990, ch. 1561, § 1, p. 7330; *DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 418-419; *Raghavan v. The Boeing Co*. (2005) 133 Cal.App.4th 1120, 1135 (*Raghavan*); *Hindin*, at p. 1255.) The 1990 amendments eliminated the reference to "issues without substantial controversy" and provided instead for the motion to be directed to an entire cause of action, an affirmative defense, an issue of duty or a claim for punitive damages. (Stats. 1990, ch. 1561, § 2, pp. 7331-7332.)[8] "As a result of the 1990 amendments, 'facts' of any kind -- undisputed, underlying, supporting, or subsidiary -- were no longer subject to summary adjudication." (*Raghavan,* at p. 1136; *Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 96-97.)

Here, Watts's motion was not directed to an entire cause of action, affirmative defense, punitive damages or an issue of duty as authorized by section 437c, subdivision (f), but solely to the fact of a manufacturing defect and the issue of Ferrellgas's liability for that defect, leaving unresolved the question of compensatory damages, an essential element of the defective product claim. Because the trial court's order granting that motion violated section 437c, subdivision (f)(1), it must be reversed. (See *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323 [§ 437c, subd. (f)(1), was

---

issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. . . ." (See Stats. 1989, ch. 1416, § 16, pp. 6229-6230.)

[8] In its May 1990 report the Senate Committee on the Judiciary noted that this amendment to former section 437c, subdivision (f), had been sponsored by the California Judges Association, which explained, "'[I]t is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action or affirmative defense. Since the cause of action must still be tried, much of the same evidence will be considered by the court at the time of trial. This bill would instead require summary adjudication of issues only where an entire cause of action, affirmative defense or claim for punitive damages can be resolved.'" (See *Hindin v. Rust, supra*, 118 Cal.App.4th at p. 1256, fn. 5.)

intended "'to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense'"]; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1097 [error for the trial court to grant summary judgment on the question of defendant's liability, with damages to be determined in a later accounting proceeding. Because issues of calculation of damages remained, proper procedure "would have been a motion to bifurcate the issue of liability, which the parties could have tried on the undisputed facts," not a motion for summary adjudication or summary judgment]; *Hindin v. Rust, supra,* 118 Cal.App.4th at pp. 1259-1260; *DeCastro West Chodorow & Burns, Inc. v. Superior Court, supra,* 47 Cal.App.4th at pp. 420-422; *Raghavan, supra,* 133 Cal.App.4th at pp. 1136-1137.)[9]

3. *Summary Adjudication Was Improper as to Watts's Comparative Fault Because Triable Issues of Fact Exist*

In a strict products liability action principles of comparative fault may apply under appropriate circumstances to diminish the amount of damages awarded. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1001; *Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 325; *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 742.) Ordinarily, comparative negligence is a question of fact. (*Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 399.) As the Court of Appeal explained in *Maxwell v. Colburn* (1980) 105 Cal.App.3d 180, 184-185, '"Courts are very reluctant to uphold a summary judgment in comparative negligence cases.' [Citation.] [I]ssues of negligence are jury questions and the court may rarely decide comparative negligence questions

---

[9] In addition to following the procedure suggested by the court in *Department of Industrial Relations v. UI Video Stores, Inc., supra,* 55 Cal.App.4th at page 1097, Watts could have filed a motion in limine to determine the legal issue of Ferrellgas's liability for selling a product containing a manufacturing defect. (See, e.g., *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 474; *Macy's California, Inc. v. Superior Court* (1995) 41 Cal.App.4th 744, 748, fn. 2.) The expansion of section 437c, subdivision (f)(1), to permit a motion for summary adjudication by the plaintiff on the liability portion of a cause of action, proposed by Justice Johnson in his concurring opinion, also has much to commend it.

without submitting them to the jury. [Citation.] [N]egligence is a question of fact if different conclusions can be rationally drawn from the evidence."

Although pursuant to section 437c, subdivision (f), Watts could properly move for summary adjudication with respect to the affirmative defense of comparative fault, Ferrellgas correctly asserts Watts's declaration in support of his motion permitted a reasonable inference of Watts's own negligence and thus a triable issue of comparative fault for the injury he suffered: Warned by his wife that the propane tank was making a hissing sound, he nonetheless put his face close to the tank to inspect it himself rather than calling for expert assistance. Watts provided explanations for that behavior; and, indeed, a jury may very well find his behavior reasonable under the circumstances. Nevertheless, resolution of that factual question is properly for the jury, not the court.[10]

4. *The Improper Summary Adjudication Prejudicially Affected the Trial*

Watts insists summary adjudication on the issue of Ferrellgas's liability for manufacturing defect, albeit improper, was harmless in light of undisputed evidence establishing defect and suggests remand for a limited retrial as to damages is all that is required. At this point, however, the evidence as to manufacturing defect is not undisputed. Although Ferrellgas apparently did not contest the existence of a manufacturing defect in its opposition to the summary adjudication motion, in motions for ex parte relief and for reconsideration Ferrellgas insisted it had been mistaken and its newly-retained expert would testify the valve had actually performed as designed. The trial court denied those motions, properly concluding the evidence should have been offered with Ferrellgas's opposition papers. However, because Watts's summary adjudication motion was unauthorized and therefore granted in error, Ferrellgas is entitled on remand to present the evidence from its expert that is now available. Under the

---

[10] Watts's contention summary adjudication was appropriate because Ferrellgas did not present any evidence of Watts's negligence is simply wrong. If the summary adjudication motion itself raises a reasonable inference of comparative fault, the motion must be denied. (*Maxwell v. Colburn*, *supra*, 105 Cal.App.3d at pp. 184-185; see also § 437c, subd. (p)(1).)

circumstances it would be unfair to conclude the issue of liability is undisputed or that remand for a limited retrial on damages is all that is required.[11]

Remand is also necessary for the jury to assess Ferrellgas's liability for failure to warn. The jury was instructed that liability for Watts's injury had been established and its only obligation was to assess compensatory and punitive damages. It was then given a special verdict form directed only to those questions of compensatory and punitive damages. On this record, there is simply no basis to conclude the jury impliedly found liability for failure to warn. Accordingly, the judgment must be reversed; and the matter remanded for retrial in its entirety.[12]

---

[11] Watts insists the testimony of Ferrellgas's expert is insufficient to raise a triable issue of fact as to manufacturing defect. Because that evidence has not been considered by the trial court, it is not properly before us. In any event, whether the evidence is sufficient to raise a triable issue of fact is irrelevant to our conclusion that summary adjudication directed solely to liability was improper.

[12] Needless to say, the trial court's erroneous summary adjudication ruling, along with its decision to remove the issue of comparative fault from the jury, compel retrial not only on liability but also on the issues of compensatory damages and punitive damages. (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1142 [comparative fault may reduce amount of compensatory damages in strict products liability action alleging product defect and failure to warn]; *State Farm Mutual Auto Ins. Co. v. Campbell* (2003)

DISPOSITION

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Ferrellgas is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

I concur:

ZELON, J.

---

538 U.S. 408, 418 [123 S.Ct. 1513, 155 L.Ed.2d 585] [due process requires amount of punitive damages bear relationship to actual harm suffered]; *Simon v. San Paolo U. S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172-1174 [same].)

JOHNSON, J. and ZELON, J., Concurring

I concur in the judgment and rationale of the majority opinion. I write separately only to urge the Legislature to cure what seems an unintended and unfair anomaly in the summary adjudication law – one that results in unequal treatment of plaintiffs and defendants as well as wasting the judiciary's and the parties' resources on unnecessary trials.

As enacted and construed, section 437c, subdivision (f)(1) precludes summary adjudication in favor of a plaintiff even if there is no triable issue but that all elements of defendant's liability have been established at the summary adjudication stage. That is because the amount of damages is also considered an element of the cause of action, even if severed through bifurcation, and seldom if ever can be determined without a trial. This impediment does not bar summary adjudication in favor of a defendant, however. If the evidence before the court demonstrates there is no triable issue but that plaintiff can*not* establish liability, the court can and will grant summary adjudication because the damage element falls by its own weight when there is no liability.

It would contribute to judicial efficiency as well as notions of even-handed justice were 437c, subdivision (f)(1) amended to permit the trial court to grant summary adjudication for the plaintiff on the liability portion of a cause of action, leaving only the damage element to be determined by the jury (or the court) in a full-blown trial. At this point, despite the absence of a triable issue on any element relevant to liability, summary adjudication is unavailable to plaintiffs. Thus, the courts and the parties are compelled to invest the time and incur the expense involved in proving all elements of liability at trial.

It is hard to believe the Legislature intended to cause the courts and parties this additional and unnecessary drain on their resources. As other appellate courts have emphasized, the Legislature enacted section 437c, subdivision (f)(1) in order "to 'eliminate summary adjudication motions that would *not reduce* the costs and length of

litigation.'"[1] Granting summary adjudication that eliminates the need to try liability clearly "*does reduce* the costs and length of litigation."

No, the more likely explanation for the current wording of (f)(1) is that the lawmakers were focused on the more typical scenario – defendants seeking summary adjudication against plaintiffs rather than the other way around. And indeed the majority of summary adjudication motions are brought by defendants. Thus, in insisting summary adjudication is not available unless it disposes of an entire "cause of action" (or affirmative defense or claim of damages or issue of duty) it is entirely possible the Legislature failed to consider the full implications of the fact damages are an element of a cause of action and what that means for plaintiffs seeking this form of pre-trial ruling.[2]

Certainly, by providing for bifurcation of liability and damage issues in the trial process, the Legislature has evidenced its desire to reduce the burdens on courts and parties whenever possible. If it makes sense to treat liability and damages separately for purposes of trial, it makes equal sense to treat them separately for purposes of summary adjudication. More often than not, trial of all the elements required to impose liability (and potentially the affirmative defenses to such liability) takes much more time and resources than the trial of the damage element. Thus, when liability is so clear the trial court can properly grant summary adjudication on this major piece of the litigation it makes eminent good sense to allow the court to do so. By amending 437c, subdivision (f) to permit this to happen, the Legislature could save both the judiciary and the parties most of the time and expense involved in trying a significant body of cases

---

[1] *Catalono v. Superior Court* (2000) 82 Cal.App.4th 91, 96, quoting *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853 (italics added).

[2] A review of the legislative history behind the amendment that produced the present version of 437c, subdivision (f) fails to reveal any mention of the issue addressed in this concurring opinion. There is not even mention of summary adjudication motions brought by or won by plaintiffs. The debate instead revolved around motions brought by defendants and whether the law would continue to allow summary adjudication of individual issues which would not result in dismissal of an entire cause of action. (See Legislative Intent Service Report on Code of Civil Procedure section 437c, subdivision (f), on file in Second Appellate District Law Library.)

that enter our legal system. That, it seems, is a worthy goal and a worthwhile reason for the Legislature to at least consider the desirability of such an amendment to 437c, subdivision (f).

JOHNSON, J.

I concur:

ZELON, J.